

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

2001 K STREET, NW
WASHINGTON, DC 20006-1047
TELEPHONE (202) 223-7300

LLOYD K. GARRISON (1946-1991)
RANDOLPH E. PAUL (1946-1956)
SIMON H. RIFKIND (1950-1995)
LOUIS S. WEISS (1927-1950)
JOHN F. WHARTON (1927-1977)

1285 AVENUE OF THE AMERICAS
NEW YORK, NY 10019-6064
TELEPHONE (212) 373-3000

UNIT 5201, FORTUNE FINANCIAL CENTER
5 DONGSANHUAN ZHONGLU
CHAOYANG DISTRICT, BEIJING 100020, CHINA
TELEPHONE (86-10) 5828-6300

SUITES 3601 – 3606 & 361C
36/F, GLOUCESTER TOWER
THE LANDMARK
15 QUEEN'S ROAD, CENTRAL
HONG KONG
TELEPHONE (852) 2846-0300

ALDER CASTLE
10 NOBLE STREET
LONDON EC2V 7JU, UNITED KINGDOM
TELEPHONE (44 20) 7367 1600

FUKOKU SEIMEI BUILDING
2-2 UCHISAIWAICHO 2-CHOME
CHIYODA-KU, TOKYO 100-0011, JAPAN
TELEPHONE (81-3) 3597-8101

TORONTO-DOMINION CENTRE
77 KING STREET WEST, SUITE 310C
P.O. BOX 226
TORONTO, ONTARIO M5K 1J3
TELEPHONE (416) 504-0520

500 DELAWARE AVENUE, SUITE 200
POST OFFICE BOX 32
WILMINGTON, DE 19899-0032
TELEPHONE (302) 655-4410

PARTNERS RESIDENT IN WASHINGTON

JUSTIN ANDERSON
J. STEVEN BAUGHMAN
CRAIG A. BENSON
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KAREN L. DUNN
KENNETH A. GALLO
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CHARLES F. "FRICK" RULE
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JULIA TARVER MASON WOOD

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KYLE J. KIMPLER*
ALEXIA D. KORBERG*
ALAN W. KORNBERG

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BRIAN KRAUSE*
CAITH KUSHNER*
DAVID A. LAKSHMIH
GREGORY J. LAUFER*
BRIAN C. LAVIN*
XIAOYU GREG LIU*
RANDY LUSKEY**
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DAVID W. MAYER*
ELIZABETH R. MCCOLM*
JEAN M. MCLOUGHLIN*
ALVARO MEMBRILLERA*
CLAUDINE MEREDITH-GOUJON*
WILLIAM P. MICHAEL*
JUDITH S. SHOELL*
CATHERINE NYARDAY*
BRAD R. OKUN*
LINDSAY B. PARKS*
ANDREW M. PARLEN
DANIELLE C. PENHALL*
CHARLES J. PESANT*
AUSTIN POLK*
VALERIE E. RADWANER*
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CARL L. REISNER*
LORIN L. REISNER*
WALTER G. RICCIARDI*
RICHARD A. ROSEN*
ANDREW N. RUBENBERG*
JUSTIN ROSENBERG*
JACQUELINE P. RUBIN*
RAPHAEL M. RUSSO*
ELIZABETH M. SACKSTEIN*
JEFFREY D. SAFFERSTEIN*
JEFFREY B. SAMUELS*
KEITH A. SCHNEIDER*
ROBERT B. SCHNEIDER*
JOHN M. SCOTT*
BRIAN SCRIVANI*
KYLE T. SEIFRIED*
AUDRA J. SOLOWAY*
CULLEN L. SINCLAIR*
SCOTT M. SLAG*
SARAH STASNY*
TARUN M. STEWART*
ERIC ALAN STONE*
AIDAN SYNNOTT*
BRETT TANNENBAUM*
RICHARD D. TARLOWE*
DAVID ARR*
MONICA K. THURMOND*
DANIEL J. TOAL*
LAURA C. TURANO*
CONRAD VAN LOGGERENBERG*
KRISHNA VEERARAGHAVAN*
JEREMY A. VELASCO*
LIZA A. VELAZQUEZ*
MICHAEL VOGEL*
RAMY J. WAHBEH*
JOHN WEBER*
LAWRENCE G. WEE*
THEODORE G. WELLS, JR.
LINEY J. TIERSMA*
STEVEN J. WILLIAMS*
LAWRENCE I. WITDORCHIC*
AUSTIN WITT*
MARK B. WLAZLO*
ADAM WOLLSTEIN*
JENNIFER H. WU*
BEATRIZ YAN*
JORDAN E. YARETT*
KAYE N. YOSHINO*
TONG YU*
TRACEY A. ZACCONE*
TAURIE M. ZEITZER*
T. ROBERT ZOCHOWSKI, JR.*

October 26, 2021

BY ECF

The Honorable Norman K. Moon
United States District Court
Western District of Virginia
255 West Main Street
Charlottesville, VA 22902

*NOT AN ACTIVE MEMBER OF THE DC BAR
**ADMITTED ONLY TO THE CALIFORNIA BAR

Re: *Sines et al. v. Kessler et al.*, No. 3:17-cv-00072 (NKM) (JCH)

Dear Judge Moon:

Plaintiffs write to provide the Court with case law concerning the appropriate remedy for a *Batson* violation. Under *Batson v. Kentucky*, trial courts retain broad discretion to fashion an appropriate remedy for a discriminatory preemptory strike. 476 U.S. 79, 99 n.24 (1986); *United States v. Aleman*, 246 F. App'x 731, 735 (2d Cir. 2007); *United States v. Walker*, 490 F.3d 1282, 1294 (11th Cir. 2007); *see also Tolen v. Cartledge*, No. 1:15-cv-02503-RBH, 2017 U.S. Dist. LEXIS 157511, at *34 n.3 (D.S.C. Sep. 26, 2017) (“*Batson* is silent as to the remedy for a *Batson* violation”).

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Several courts have held that *Batson*'s purpose is best effectuated by forfeiting the violating party's unconstitutional preemptory strike. *Aleman*, 246 F. App'x at 735; *Walker*, 490 F.3d at 1295; *Peetz v. State*, 180 S.W.3d 755, 761 (Tex. App. 2005) ("The effect of a successful Batson challenge always has been that the party exercising the strikes does not enjoy the benefit of those strikes"); *People v. Johnson*, 196 Misc. 2d 417, 420 (N.Y. Sup. Ct. 2003) ("If the court finds purposeful discrimination, it should permanently disallow the challenge and seat the juror because returning the party to its original position would not deter subsequent discriminatory strikes"). Other courts have reinstated the preemptory strike where there was "no evidence of egregious bad faith or maliciousness on the part" of the striking party. *United States v. Ramirez-Martinez*, 273 F.3d 903, 910 (9th Cir. 2001).

Jimenez v. City of Chicago, 877 F. Supp. 2d 649, 662 (N.D. Ill. 2012), is instructive here. The "Defendants' justification of their decision to challenge an African-American juror was not at all credible, because the justification applied much more strongly to a white juror whom defendants did not strike. When confronted with the discrepancy, defendants could not give a satisfactory explanation, thus further confirming that any nonracial justification they offered was pretextual." *Id.* The Court then held that "allowing defendants to try again . . . would provide an insufficient sanction for and deterrence of racially discriminatory conduct." *Id.*

Very truly yours,



Karen Dunn

Of Counsel:

Roberta A. Kaplan (*pro hac vice*)
Michael L. Bloch (*pro hac vice*)
Raymond P. Tolentino (*pro hac vice*)
Yotam Barkai (*pro hac vice*)
Alexandra K. Conlon (*pro hac vice*)
Jonathan Kay (*pro hac vice*)
KAPLAN HECKER & FINK LLP
350 Fifth Avenue, Suite 7110
New York, NY 10118
Telephone: (212) 763-0883
rkaplan@kaplanhecker.com

Karen L. Dunn (*pro hac vice*)
Jessica Phillips (*pro hac vice*)
William A. Isaacson (*pro hac vice*)
Giovanni Sanchez (*pro hac vice*)
PAUL, WEISS, RIFKIND, WHARTON
& GARRISON LLP
2001 K Street, NW
Washington, DC 20006-1047
Telephone: (202) 223-7300
Fax: (202) 223-7420
kdunn@paulweiss.com

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

mbloch@kaplanhecker.com
rtolentino@kaplanhecker.com
ybarkai@kaplanhecker.com
aconlon@kaplanhecker.com
jkay@kaplanhecker.com

Robert T. Cahill (VSB 38562)
COOLEY LLP
11951 Freedom Drive, 14th Floor
Reston, VA 20190-5656
Telephone: (703) 456-8000
Fax: (703) 456-8100
rcahill@cooley.com

David E. Mills (*pro hac vice*)
Joshua M. Siegel (VSB 73416)
COOLEY LLP
1299 Pennsylvania Avenue, NW
Suite 700
Washington, DC 20004
Telephone: (202) 842-7800
Fax: (202) 842-7899
dmills@cooley.com
jsiegel@cooley.com

jphillips@paulweiss.com
wisaacson@paulweiss.com
gsanchez@paulweiss.com

Alan Levine (*pro hac vice*)
COOLEY LLP
55 Hudson Yards
New York, NY 10001
Telephone: (212) 479-6260
Fax: (212) 479-6275
alevine@cooley.com

J. Benjamin Rottenborn (VSB 84796)
WOODS ROGERS PLC
10 South Jefferson St., Suite 1400
Roanoke, VA 24011
Telephone: (540) 983-7600
Fax: (540) 983-7711
brottenborn@woodsrogers.com

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2021, I served the following via electronic mail:

Elmer Woodard
5661 US Hwy 29
Blairs, VA 24527
isuecrooks@comcast.net

James E. Kolenich
Kolenich Law Office
9435 Waterstone Blvd. #140
Cincinnati, OH 45249
jek318@gmail.com

*Counsel for Defendants Jason Kessler,
Nathan Damigo, and Identity Europa, Inc.
(Identity Europa)*

Bryan Jones
106 W. South St., Suite 211
Charlottesville, VA 22902
bryan@bjoneslegal.com

*Counsel for Defendants Michael Hill,
Michael Tubbs, and League of the South*

Joshua Smith
Smith LLC
807 Crane Avenue
Pittsburgh, PA 15216-2079
joshsmith2020@gmail.com

*Counsel for Defendants Matthew Parrott,
Traditionalist Worker Party and Matthew
Heimbach*

David L. Campbell
Justin Saunders Gravatt
Duane, Hauck, Davis & Gravatt, P.C.
100 West Franklin Street, Suite 100
Richmond, VA 23220
dcampbell@dhdglaw.com
jgravatt@dhdglaw.com

Counsel for Defendant James A. Fields, Jr.

William Edward ReBrook, IV
The ReBrook Law Office
6013 Clerkenwell Court
Burke, VA 22015
edward@rebrooklaw.com

*Counsel for Defendants Jeff Schoep,
National Socialist Movement, Nationalist
Front, Matthew Parrott, Traditionalist
Worker Party and Matthew Heimbach*

I hereby certify that on October 26, 2021, I also served the following via mail and electronic mail:

Richard Spencer
richardbbspencer@icloud.com
richardbbspencer@gmail.com

Vanguard America
c/o Dillon Hopper
dillon_hopper@protonmail.com

Elliott Kline a/k/a Eli Mosley
eli.f.mosley@gmail.com
deplorabletruth@gmail.com
eli.r.kline@gmail.com

Christopher Cantwell

Christopher Cantwell 00991-509
Central Virginia Regional Jail
13021 James Madison Hwy
Orange, VA 22960

and

Christopher Cantwell 00991-509
USP Marion, 4500 Prison Rd.
P.O. Box 2000
Marion, IL 62959

Robert "Azzmador" Ray
azzmador@gmail.com



Karen L. Dunn (*pro hac vice*)
PAUL, WEISS, RIFKIND, WHARTON
& GARRISON LLP

Counsel for Plaintiffs